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In the Supreme Court of the United States

FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. MCCAULEY, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

Many of amicus's members have been subjected to abusive, extortionate class actions in state courts. They accordingly have a strong interest in exposing the fallacy in the Ninth Circuit's interpretation of the amount-in-controversy requirement that paradoxically makes it more difficult to remove class actions to federal court than individual law suits.[1]

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. Attorneys in the Chicago office of Mayer, Brown, Rowe & Maw (then Mayer, Brown & Platt) briefly served as local counsel for petitioner Citibank (South Dakota), N.A. ("Citibank") in one of the six state-court class actions that were removed to federal court and then transferred to the Western District of Washington pursuant to 28 U.S.C. § 1407. After that transfer, in January 1998, Mayer, Brown, Rowe & Maw's role as counsel for Citibank in this litigation came to an end.

The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

The Ninth Circuit accepted the proposition that, in individual cases seeking injunctive relief, the amount-in-controversy requirement for diversity jurisdiction is satisfied if either the value of the injunction to the plaintiff or the defendant's cost of complying with the injunction exceeds $75,000. Pet. App. 7a. It held, however, that, in *class actions* seeking injunctive relief, there is an "inherent conflict" between this "either viewpoint" principle and this Court's cases holding that the value of the claims of multiple plaintiffs may not be aggregated to satisfy the amount-in-controversy requirement. *Id.* at 8a-9a. Holding that the former principle "must yield" (*id.* at 9a), the Ninth Circuit fashioned a new rule for class actions seeking injunctive relief: in class actions — but not individual suits where there is no "inherent conflict" — "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000" (*id.* at 12a).

The Ninth Circuit's new rule is logically flawed for two independent reasons. First, when, as here, the defendant's compliance costs would suffice to create diversity jurisdiction had a single plaintiff brought the action, the non-aggregation principle is inapplicable and there therefore is no "inherent conflict" requiring creation of a special rule. Second, the Ninth Circuit's ruling frustrates the rationale for diversity jurisdiction in the first place. The recent uptick in abusive class-action lawsuits has demonstrated that, if anything, out-of-state defendants need *more* protection from the parochial prejudices of juries and state court judges beholden to local interests in the class-action context; they certainly should not be afforded *less* protection.

ARGUMENT

28 U.S.C. § 1332 provides that, *inter alia,* when the parties are citizens of different states, the federal courts have jurisdiction over the case if "the matter in controversy" exceeds

$75,000. The Ninth Circuit recognized that, in determining the value of "the matter in controversy," it is necessary to consider "the pecuniary result to either party which the judgment would directly produce." Pet. App. 7a. "In other words," the court explained, "where the value of a plaintiff's potential recovery * * * is below the jurisdictional amount, but the potential cost to the defendant of complying with [a requested] injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes." *Ibid.*

That should have been the end of the matter because it is beyond dispute that the cost to petitioners of affording the injunctive relief sought by respondents would far exceed $75,000. The court went on to hold, however, that, although "logic would dictate that [the either viewpoint rule] should apply to all multi-party complaints" (*id.* at 8a), doing so would create an "inherent conflict" with this Court's holdings that the claims of multiple plaintiffs may not be aggregated in determining whether the amount-in-controversy requirement is satisfied (*id.* at 8a-9a). The Ninth Circuit acknowledged that petitioners' argument did not involve aggregation: the fixed costs of injunctive relief would greatly exceed $75,000 whether there were "one plaintiff or * * * six million." *Id.* at 12a. It nevertheless felt that fealty to "the principle underlying the jurisdictional amount requirement" — "to keep *small* diversity suits out of federal court" — required it to hold that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Ibid.* (emphasis added).

Beyond observing that the plain language of Section 1332 permits no other conclusion, we will leave to petitioners the task of explaining why the "either viewpoint" rule is correct. Nor do we here challenge this Court's adoption of the non-aggregation principle in *Snyder v. Harris,* 394 U.S. 332 (1969),

and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).[2] As the Ninth Circuit recognized, the fixed costs of providing the injunctive relief demanded by respondents would exceed $75,000 even if this were an individual suit. We instead will endeavor to demonstrate why the Ninth Circuit has turned logic on its head by adopting a special rule for multi-plaintiff cases that the administrative costs of complying with an injunction may not be considered in determining the amount in controversy.

The Ninth Circuit's holding is illogical in two distinct ways. First, the premise underlying the Ninth Circuit's adoption of a special rule for class actions — that this case implicates an "inherent conflict" between the either viewpoint rule and the non-aggregation rule — is a false one. Second, the policy concerns that motivated the creation of diversity jurisdiction apply with greater, not lesser, force in the context of multi-party actions. As recent experience reflects, the risk that fundamental fairness to out-of-state defendants will be sacrificed is at its zenith when massive class actions are filed in state courts. It thus makes no sense to create a special rule that would make it harder to remove a class action than it would be to remove an individual case seeking precisely the same relief.

1. The Ninth Circuit recognized that, if this were an individual case seeking reinstatement of petitioners' rebate program, the "either viewpoint" rule would apply, and, because the cost of complying with an injunction would exceed $75,000, the amount-in-controversy requirement would be satisfied. Indeed, unless the "either viewpoint" rule were rejected entirely, no other conclusion is possible.

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[2] Having said that, we do think that the non-aggregation rule has no basis in either the language of Section 1332 or the policy underlying the amount-in-controversy requirement and that, when a case properly presents the issue, the Court should overrule *Snyder* and *Zahn*.

The court concluded, however, that in class actions seeking injunctive relief there is an "inherent conflict" between the either viewpoint rule and the non-aggregation rule, which necessitates "that the former must yield." Pet. App. 8a-9a. Accordingly, it held, in such cases "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.* at 12a. This is a logical fallacy. When, as here, the cost of complying with an injunction would exceed $75,000, whether there is "one plaintiff or * * * six million" (*ibid.*), the non-aggregation principle is inapplicable. Accordingly, there is no "inherent conflict" that warrants abandoning the "either viewpoint" rule and ignoring the administrative costs of compliance.

Nor is the Ninth Circuit's fallacious reasoning excused by its *ipse dixit* that consideration of the administrative costs of compliance "is fundamentally violative of the principle underlying the jurisdictional amount—to keep small diversity suits out of federal court" (*ibid.*). If the "either viewpoint" rule is valid — and we submit that it is for all of the reasons articulated in petitioners' brief — a suit seeking an injunction that would cost millions of dollars to comply with is not a "small diversity suit[]."

2. Putting aside the direct fallacy in the Ninth Circuit's reasoning, making it harder to remove class actions than individual cases requesting the same relief cannot be squared with the reason Congress created — and has never withdrawn — diversity jurisdiction.[3] It is well established that

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[3] It also merits mention that erecting a stricter rule for class actions than individual cases finds no support in *Snyder* and *Zahn*. To the contrary, the essential point of *Snyder* is that the question whether a lawsuit is a class action should not alter the determination of whether that litigation meets the standards for diversity jurisdiction. *Snyder* held that the aggregation of individual claims would violate Federal Rule of Civil Procedure 82, which reinforces that the Federal Rules "'shall not be construed to extend or limit the jurisdiction of the

the purpose of diversity jurisdiction is to protect out-of-state defendants from the parochial interests of juries and state court judges beholden to local interests. As Justice Frankfurter once elaborated:

> The power of Congress to confer [diversity] jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias.* * * [T]here was fear [among the Framers and ratifiers] that parochial prejudice by the citizens of one State toward those of another * * * would lead to unjust treatment of citizens of other States * * *.

Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring).[4]

United States district courts.'" 394 U.S. at 337 (quoting Fed. R. Civ. P. 82). But just as the Rules cannot be construed to "extend" diversity jurisdiction to a lawsuit where no individual plaintiff could sue in federal court, so too can they not be construed to "limit" that jurisdiction to preclude federal diversity jurisdiction over a case merely because it was brought as a class action. That is exactly what the Ninth Circuit did here.

[4] See also, *e.g.*, *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 111-112 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) ("The object of the provisions of the Constitution and statutes of the United States, in conferring upon the Circuit Courts of the United States jurisdiction of controversies between citizens of different States of the Union, * * * was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal[s] might not be impartial between their own citizens and foreigners."); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.); THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

While diversity jurisdiction has always been a significant protection for out-of-state parties against being treated unfairly by local courts, the need for that protection has multiplied with the advent of modern class-action litigation. Thus, Judge Easterbrook recently explained:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). The Fifth Circuit has similarly noted:

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted).

The federal courts have recognized that, in order to prevent the class action device from being used as a weapon of extortion, it is necessary to apply the requirements of Federal Rule of Civil Procedure 23 rigorously.[5] In particular, they have refused to paper over differences in the laws of the various states simply to make a case manageable as a multi-state class

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[5] See, *e.g.*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *Castano*, 84 F.3d at 740.

action.[6] The federal appellate courts have also uniformly refused to permit class actions when the claims of the class members would require individualized proof and the defendant would have individualized defenses to those claims.[7] Indeed, several federal courts have recognized that it would violate the defendant's due process rights to try a case on the basis of class-wide proof when claims and defenses are individualized.[8]

Regrettably, the state courts, as a group, have been far more lax in enforcing statutory and constitutional limitations on class actions.[9] As one Member of Congress recently testified at a

[6] See, *e.g.*, *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024, 1025 (11th Cir. 1996); *Castano*, 84 F.3d at 749-750; *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 223 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457-462 (D.N.J. 1998).

[7] See, *e.g.*, *Broussard*, 155 F.3d at 340-344; *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397-399 (6th Cir. 1998) (en banc); *Andrews*, 95 F.3d at 1023-1025; *Castano*, 84 F.3d at 744-745; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626-630 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854-856 (9th Cir. 1982); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-883 (5th Cir. 1973).

[8] See, *e.g.*, *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 487-489 & n.21 (E.D. Pa. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997).

[9] We are not suggesting that every state court (or even the majority) has acquiesced in class action abuse, but simply that such abuse occurs with sufficient regularity in the state court system as to make it both counterintuitive and contrary to the core rationale of diversity jurisdiction to endorse a construction of Section 1332 that makes it harder to remove class actions than individual cases that seek the same relief.

House hearing:

> Opportunistic lawyers have identified those states and particular judges where the class action device can be exploited. The most significant of these devices is the certification of the class itself. For many companies, it is easier and less costly to settle a class action suit once it has been certified than to fight it in a foreign jurisdiction before a potentially unfriendly judge and jury. Some state courts, however, do not give the defendants a fighting chance. They routinely certify classes before the defendant has been served with a complaint and given an opportunity to defend itself. In one case, a state court judge certified the class before the case was even filed in the court.

Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Mar. 5, 1998) (statement of Rep. James P. Moran) (available at http://www.house.gov/judiciary/41155.htm) (hereinafter "Moran Testimony").

The more sophisticated members of the plaintiffs' class action bar have managed to identify specific counties within particular states in which they can be virtually assured of finding a judge who will certify a case as a class action without regard to whether it can fairly be tried as one. As the Wall Street Journal has reported:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union City, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns * * *.
>
> Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities often have only one or two judges in town. * * * Unlike federal judges,

many state judges are popularly elected, raising the possibility of bias.

Richard Schmitt, *Justice P.F.D: Big Suits Land in Rural Courts*, WALL ST. J., Oct. 10, 1996, at B1.

A few states have become particularly notorious for allowing extortionate class actions and running roughshod over the constitutional rights of out-of-state defendants and absent class members alike. For example, one study found that in 1995-1997 courts in six thinly populated rural Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes, primarily against large national companies. Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks at *Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Mar. 5, 1998)) (available at 1998 WL 122544).[10] Another study found that the number of class actions filed in Texas state courts rose by 820% between 1988 and 1998. See *Class Action Litigation–A Federalist Society Survey*, 1 CLASS ACTION WATCH (available at http://www.fed-soc.org/Publications/classactionwatch/volume1issue1.htm). That rate of increase is significantly higher than in the federal courts, where the number of pending class actions increased during the same ten-year period by 338%. *Ibid.*

These hand-picked state courts have demonstrated a propensity to certify classes that federal courts have refused to certify and to dispense casually with the procedural safeguards required by the Constitution and faithfully applied in the federal courts. Whenever the courts of one state begin to enforce the

[10] Dr. Hendricks is the founder of an Alabama research and development company who appeared on behalf of the Chamber.

state-law and constitutional limits on class certification,[11] class action plaintiffs and their attorneys have merely moved their "litigation road show" to more hospitable forums — such as Mississippi,[12] Washington,[13] and southern Illinois, where an October 1999 judgment of more than a billion dollars[14] has

[11] The Alabama Supreme Court has recently begun to rein in runaway state trial courts that were certifying classes without adequate analysis, see, *e.g.*, *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 10-11 (Ala. 1998) (ordering decertification of nationwide class because laws of different states would apply to different class members' claims and because the claims would present individual issues requiring subjective proof), and Texas, which was similarly known as a hotbed of class action activity, has also of late tightened its requirements for class certification through its highest court. See, *e.g.*, *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000) (ordering decertification of class that was not clearly ascertainable).

[12] See Jerry Mitchell, *Out-of-State Cases In-State Headaches*, CLARION-LEDGER, June 17, 2001 (noting that "[n]ews of Mississippi's multimillion-dollar verdicts has attracted trial lawyers from other states, particularly Texas and Alabama").

[13] See, *e.g.*, *Sitton v. State Farm Mut. Auto. Ins. Co.*, No. 00-2-10013-2 (Wash. Super. Ct. 2000) (certifying a class action for injunctive relief and damages on behalf of State Farm insureds alleging improper denials of first-party medical benefits provided by their automobile policies, even though numerous other courts had refused to certify class actions involving the same defendant, many of the same putative class members, and virtually identical legal claims); *Busani v. United Servs. Auto. Ass'n*, No. 99-2-68217-1 (Wash. Super. Ct. 2001) (certifying a 27-state class action seeking "inherent diminished value" ("IDV") damages under the putative class members' automobile insurance policies, even though in many jurisdictions it remains a question of first impression whether IDV claims are legally cognizable even in individual actions, and courts in several other states have already held that they are not).

[14] See *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001) (affirming all but $130,000,000 of $1,186,636,180

served as a magnet attracting class-action lawyers.

Southern Illinois in particular has become the focal point of a flurry of class-action activity. In fact, the biggest growth industry in Madison County, Illinois now seems to be the litigation of class actions; that one jurisdiction has experienced a "steep rise in class action filings over the last several years" and is now "ranked third nationwide (after [the significantly larger] Los Angeles County, California and Cook County, Illinois) in the estimated number of class actions filed each year."[15]

In short, out-of-state class action defendants have been subjected to procedural unfairness in state courts that would not be tolerated by the federal courts. That trend has been accelerating in recent years. As Congressman Moran put it, "[i]n essence, we have a situation where out of state defendants are being haled into the plaintiffs' state court where they face complex litigation with large sums of money at stake. These are the types of cases for which diversity jurisdiction was created." Moran Testimony, *supra*.

In view of the serious threat to fundamental fairness posed by state-court class actions — and the severe extortionate potential of claims for injunctive relief that would cost millions of dollars to effectuate — it makes no sense to interpret Section 1332 to make it more difficult to remove class actions than

individual cases. The only approach that is consistent with both the language and the purpose of the diversity statute is to apply

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judgment) (petition for leave to appeal pending).

[15] See Manhattan Institute, *Civil Justice Report: They're Making a Federal Case out of it . . . in State Court* at 7 (Sept. 2001) (available at http://www.manhattan-institute.org/cjr_03.pdf); see also Noam Nesner & Brian Brueggemann, *The Judges of Madison County: Lawyers Looking for Fat Payouts in Class Action Cases Know Where to Head*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39.

the either viewpoint rule across-the-board. The Ninth Circuit's refusal to do so necessitates reversal.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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